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No. 333

In the Supreme Court of the United States

OCTOBER TERM, 1948

AERONAUTICAL INDUSTRIAL DISTRICT LODGE 727, AN UNINCORPORATED ASSOCIATION, PETITIONER

v.

JAMES L. CAMPBELL, MITCHELL B. JOPLIN, MALCOLM E. KIRK, AND LOCKHEED AIRCRAFT CORPORATION, A CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS JAMES L. CAMPBELL, MITCHELL B. JOPLIN, AND MALCOLM E. KIRK

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OPINIONS BELOW

The oral opinion of the District Court (R. 118–119) is not officially reported. The opinion of the United States Court of Appeals for the Ninth Circuit (R. 132) is reported at 169 F. 2d 252.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on July 26, 1948 (R. 136). The petition for a writ

of certiorari was filed on October 1, 1948. The jurisdiction of this Court rests upon 28 U. S. C. 1254.

QUESTION PRESENTED

Whether Section 8 (c) of the Selective Training and Service Act of 1940 protects a restored veteran during the first year of his employment against lay-off before union officers with shorter periods of service but who were accorded "top" seniority pursuant to a modification of the collective bargaining agreement after the veteran had entered military service, where both the original and modified seniority provisions were negotiated by a union of which the veteran was a member.

STATUTE INVOLVED

Section 8 (c) of the Selective Training and Service Act of 1940 (54 Stat. 885; 50 U. S. C. App. 308 (c)) provides as follows:

> (c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time

such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration."

STATEMENT

Respondent employees brought this suit under Section 8 (c) of the Selective Training and Service Act to recover compensation for loss of wages for a period during which they were laid off in alleged violation of their reemployment rights as honorably discharged veterans (R. 2–11). At the time of the induction into military service of the three employees involved, a collective bargaining agreement was in effect between Lockheed Aircraft Corporation, their employer, and petitioner, their collective bargaining agent, which provided for lay-offs based upon seniority and other factors not relevant here (R. 100, 102). During their absence, a new collective agreement was executed which modified the seniority provisions by giving union chairmen top seniority regardless of length of service (R. 103, 105).

Subsequent to the execution of this agreement, the employees were honorably discharged from military service and were restored to their jobs (R. 98–100, 103). They had remained members of the union throughout this period (R. 97–98). Thereafter, but within one year after they had been restored to their former positions, they were laid off pursuant to the terms of the new collective bargaining agreement, while union

chairmen with shorter periods of service were retained in their jobs (R. 106). They protested this action and were restored to active employment within a month (R. 106–107). An action was then brought for the compensation lost during the lay-off period (R. 2). Both the District Court and the Court of Appeals held that Section 8 (c) of the Selective Training and Service Act of 1940 prevented any adverse modification of the seniority rights of reemployed veterans during the first year of reemployment, and awarded compensation to the respondent employees for the time lost (R. 113–114, 134–135).

DISCUSSION

This Court has passed upon the restored veteran's rights under an unmodified seniority system during the first year of his reemployment (*Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275), and his rights after the first year when seniority rights have been changed by a collective bargaining agreement. *Trailmobile Co.* v. *Whirls*, 331 U. S. 40. The question of the restored veteran's rights during the first year of his reemployment, when a collective bargaining agreement has modified the seniority system in effect at the time he entered military service, has not been decided by this Court.

Although both courts found support for their conclusions in the language in the *Fishgold* and *Whirls* opinions, the decision of the court be-

low is diametrically contrary to the result reached by the Court of Appeals for the Third Circuit in *Gauweiler* v. *Elastic Stop Nut Corporation*, 162 F. 2d 448, on virtually identical facts. See also the decisions of the same court in *Koury* v. *Elastic Stop Nut Corp.*, 162 F. 2d 544; *DiMaggio* v. *Elastic Stop Nut Corp.*, 162 F. 2d 546; *Payne* v. *Wright Aeronautical Corp.*, 162 F. 2d 549. The court below held that the provision for top seniority to union chairmen was an invalid attempt to diminish the reemployment rights guaranteed restored veterans (R. 134). The Court of Appeals for the Third Circuit, however, upheld higher seniority for a union official on the ground that even during the first year of his reemployment "the employee absent in war service is bound by the non-discriminatory arrangements made between the bargaining unit and the employer during his absence." 162 F. 2d at 451.

The type of provision in question is one commonly found in collective bargaining agreements, and may affect the rights of many restored veterans to money judgments or continued employment. The precise issue of this case will also arise under the Selective Service Act of 1948, where it is at least possible that it would be governed by the Court's disposition of this case—despite some differences in the phrasing of the 1940 and 1948 Acts. In any event, we do not oppose the granting

of the petition for a writ of certiorari because of the square conflict in the circuits.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

NOVEMBER 1948.

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